

1 The ten images downloaded on November 5 formed the bases
2 for counts one through ten. The same expert also examined
3 Hartman's home computer and found multiple images of child
4 pornography in unallocated (deleted) space. One image formed
5 the basis of count eleven.
6 (Exhibit J, Mem. Dec. at 2.).

7 R&R at 1-2.

8 Petitioner objects to this recitation of the facts by alleging that there are additional
9 relevant facts that the Arizona Court of Appeals failed to discuss. Doc. 26 at 1-3.
10 Specifically, Petitioner alleges that the man who found the phone, "contacted the Petitioner
11 [and] requested money to get his phone back [.] If he did not comply the man stated that he
12 would find some stuff on his phone that would put him in a lot of trouble." *Id.* at 1.

13 **Procedural History**

14 The R&R recounted the procedural history of this case as follows:

15 Petitioner was indicted in the Mohave County Superior Court on eleven
16 counts of Sexual Exploitation of a Minor. (Exhibit B.) On February 16, 2010,
17 Petitioner proceeded to trial with counsel. (Exhibit C, R.T. 2/16/10.) The jury
18 convicted on all counts, and found the victims in each image were under the
19 age of fifteen. Petitioner was sentenced to mitigated, consecutive, ten year
20 sentences on each count, for an effective sentence of 110 years....

21 Petitioner filed a direct appeal. Counsel was appointed, and filed an
22 Opening Brief (Exhibit G) raising claims of: (1) insufficient evidence of
23 knowing possession as to the image on the computer; (2) insufficient evidence
24 of knowing possession of the images on the cell phone; (3) double jeopardy
25 violations; and (4) a grossly disproportionate sentence under the Eighth
26 Amendment. The Arizona Court of Appeals rejected each of Petitioner's
27 claims, and affirmed his convictions and sentences, with one judge specially
28 concurring on an issue of state sentencing law. (Exhibit J, Mem. Dec.
29 10/11/11.) ...

30 Petitioner sought (Exhibit L) and obtained (Exhibit M) an extension of
31 time to file a post-conviction relief petition. He ultimately filed a pro se
32 petition (Exhibit N), raising claims of insufficient evidence and a
33 disproportionate sentence. The PCR court appointed counsel to represent
34 Petitioner. (Exhibit O, Order 8/1/12.) Counsel reported an inability to find a
35 claim for relief. (Exhibit N.) Petitioner was granted leave to file a
36 supplemental petition, but failed to do so. (Exhibit Q, Order 3/7/13.) As of the
37 filing of Respondents' Response (Doc. 15), the matter remained pending.
38 (Exhibit R, Docket; Answer, Doc. 15 at 11.).

39 R&R at 2-3. Petitioner did not object to this procedural history and the Court hereby accepts
40 and adopts it.

Petitioner's Request for Habeas Relief

In his objections, Petitioner objects to the R&R's recommendation that this Court deny Petitioner's claim for habeas relief based on Petitioner's argument that there was insufficient evidence to support the conviction. In the R&R, the Magistrate Judge addresses Petitioner's insufficiency of the evidence argument at pages 8-10.¹ The Magistrate Judge determined that the state court's ruling was not contrary to, nor an unreasonable application of federal law. *Id.*; *see also Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

Regarding the governing law, the R&R states:

The Due Process Clause of the Fourteenth Amendment protects a defendant against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). "The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." *Carella v. California*, 491 U.S. 263, 265 (1989) (citation omitted).

Accordingly, in the face of a sufficiency of the evidence claim, the habeas court must determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Wright v. West*, 505 U.S. 277, 290 (1992); *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Under *Jackson*, on habeas, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. In making this evaluation, the court must not only view the evidence in the light most favorable to the prosecution, but must also presume the trier of fact resolved conflicting evidence in favor of the prosecution. *Wright*, 505 U.S. at 295-296; *Jackson*, 443 U.S. at 319, 326; *Taylor v. Stainer*, 31 F.3d 907, 908-09 (9th Cir. 1994).

R&R at 8-9. Petitioner does not object to the governing law as recounted in the R&R on an insufficiency of the evidence claim and the Court hereby accepts and adopts it.

¹ This Court will deem this claim exhausted before this state court because it was exhausted on direct appeal. Neither party has supplemented the record to advise this Court whether the state post-conviction relief court ever ruled on Petitioner's post-conviction relief petition. It is possible that the state court does not deem any petition still pending because Petitioner never filed a "supplemental petition." Regardless, however, because this claim was exhausted on direct appeal, this Court will consider it to be exhausted for purposes of this habeas petition. *See* R&R at 6 ("Petitioner raised the insufficient evidence claim in Ground One [of this habeas petition] in his direct appeal to the Arizona Court of Appeals. (Exhibit G at 21 *et seq.*)").

1 However, Petitioner objects to the conclusion of the R&R that the state court correctly
2 applied this law to the facts of Petitioner's case. Doc. 26. Specifically, Petitioner objects to
3 the Arizona Court of Appeals conclusion (which the R&R found was not contrary to nor an
4 unreasonable application of federal law) that there was sufficient evidence to convict
5 Petitioner. Petitioner argues, "... the essence of the Petitioner['s] insufficient evidence
6 argument was that [the man who found the phone] had place[d] the child pornography on the
7 phone. This is proof of reasonable doubt." *Id.* at 2. In other words, Petitioner alleges that
8 this "extortion" attempt causes the other evidence of his guilt to be insufficient to sustain his
9 conviction. *Id.* at 1-2.

10 The R&R recounts the facts of Petitioner's conviction as follows:

11 The essence of Petitioner's extortion allegation is that the finder of the
12 phone had placed the pornographic images on the phone. Substantial evidence
13 in the record eroded the credibility of that assertion. First, Petitioner did not
14 report the extortion attempt to police – either as to the return of the phone or
15 the threat to load it with incriminating evidence – until after he was placed
16 under suspicion. This was despite being encouraged by his friend to report it
17 to police. (Exhibit C, R.T. 2/16/10 at 159, et seq.; Exhibit E, R.T. 2/18/10 at
18 78-80.) Second, Petitioner could not remember the name of the friend he had
19 enlisted to go with him to meet with the finder, and had to call back to report
20 a name. (Exhibit C, R.T. 2/16/10 at 160.) Third, Petitioner's friend's testimony
21 was not that the finder had threatened to place incriminating matters on the
22 phone, but that they were already there. (Exhibit E, R.T. 2/18/10 at 63, 65,
23 75-76.) This was consistent with the prosecution's theory of the case. Fourth,
24 the evidence cited by the Arizona Court of Appeals created a strong inference
25 that the images had been downloaded by Petitioner, not the finder, e.g. the
26 existence of child pornography on both the phone and the home computer, that
27 one of the images was common to both locations, and the images on the phone
28 were located on sites searched for on the computer. (Exhibit J, Mem. Dec. at
4-5.)

 Accordingly, even when considering the evidence of the extortion
allegations, there was ample evidence in the record from which a reasonable
juror could find guilt beyond a reasonable doubt.

R&R at 9-10.

 In his objections, Petitioner makes three factual arguments. First, Petitioner argues
that the man who found the phone was not credible because his story of where he found the
phone changed. Doc. 26 at 2. Second, Petitioner admits that he could not remember his
friend's name, but claims that was because it was really his wife's friend. *Id.* And, finally,

1 Petitioner argues that he did report the loss of his phone to the police (Petitioner does not
2 comment on whether he reported the extortion attempt).

3 As the case law regarding a sufficiency of the evidence challenge directs, this Court
4 does not re-evaluate the evidence *de novo*. Instead, this Court considers the evidence to
5 determine whether any rational trier of fact could have found guilt beyond a reasonable
6 doubt, viewing the evidence in the light most favorable to the prosecution and assuming the
7 jury resolved conflicting evidence in favor of the prosecution. *See Wright*, 505 U.S. at
8 295-296; *Jackson*, 443 U.S. at 319, 326; *Taylor*, 31 F.3d at 908-09. Under this legal test, this
9 Court agrees with the R&R that there was ample evidence against Petitioner for a rational
10 trier of fact to have found him guilty beyond a reasonable doubt. Accordingly, habeas relief
11 will be denied.

12 **Certificate of Appealability**

13 In his objections, Petitioner also requests that this Court issue a certificate of
14 appealability. Doc. 26 at 3. “Where a district court has rejected the constitutional claims on
15 the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must
16 demonstrate that reasonable jurists would find the district court’s assessment of the
17 constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

18 In this case, this Court concludes that reasonable jurists would not find this Court’s
19 assessment of the constitutional claims debatable or wrong. Accordingly, the request for a
20 certificate of appealability is denied.

21 **Conclusion**

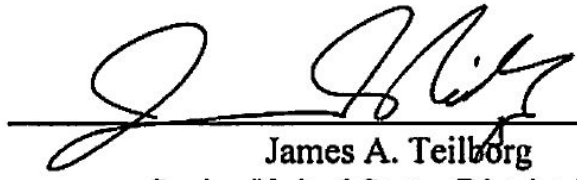
22 Based on the foregoing,

23 **IT IS ORDERED** that the Motion to Reopen to allow this Court to consider
24 Petitioner’s objections to the R&R (part of Doc. 26) is granted. The order and judgment
25 enter on September 5, 2014 (Docs. 22 and 23) are vacated. The objections contained in Doc.
26 26 are deemed timely. The Court, having considered those objections, overrules them.
27 Therefore, for the reasons stated above, the R&R (Doc. 19) is accepted and adopted; the
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1 Petition (Doc. 1) is denied; and the Clerk of the Court shall enter judgment of dismissal with
2 prejudice accordingly.

3 **IT IS FURTHER ORDERED** that the request for a certificate of appealability (part
4 of Doc. 26) is denied.

5 DATED this 11th day of March, 2015.

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10 James A. Teilborg
11 Senior United States District Judge
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